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Supreme Court of the United States

OCTOBER TERM, 1942.

No. **576**.

SAMUEL OKIN,

Petitioner,

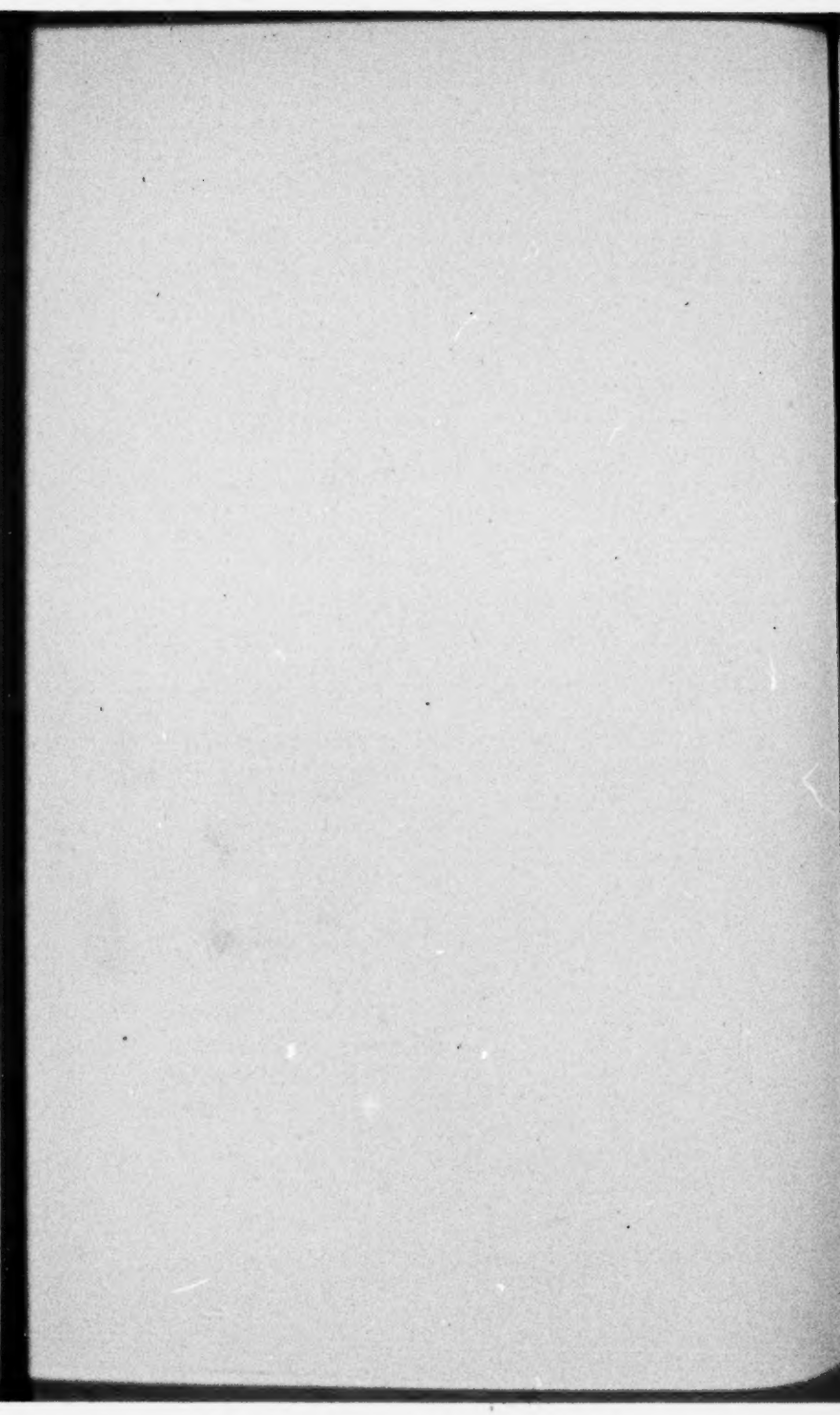
v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT.**

SAMUEL OKIN,
Attorney for Petitioner,
#32 Broadway,
New York City.



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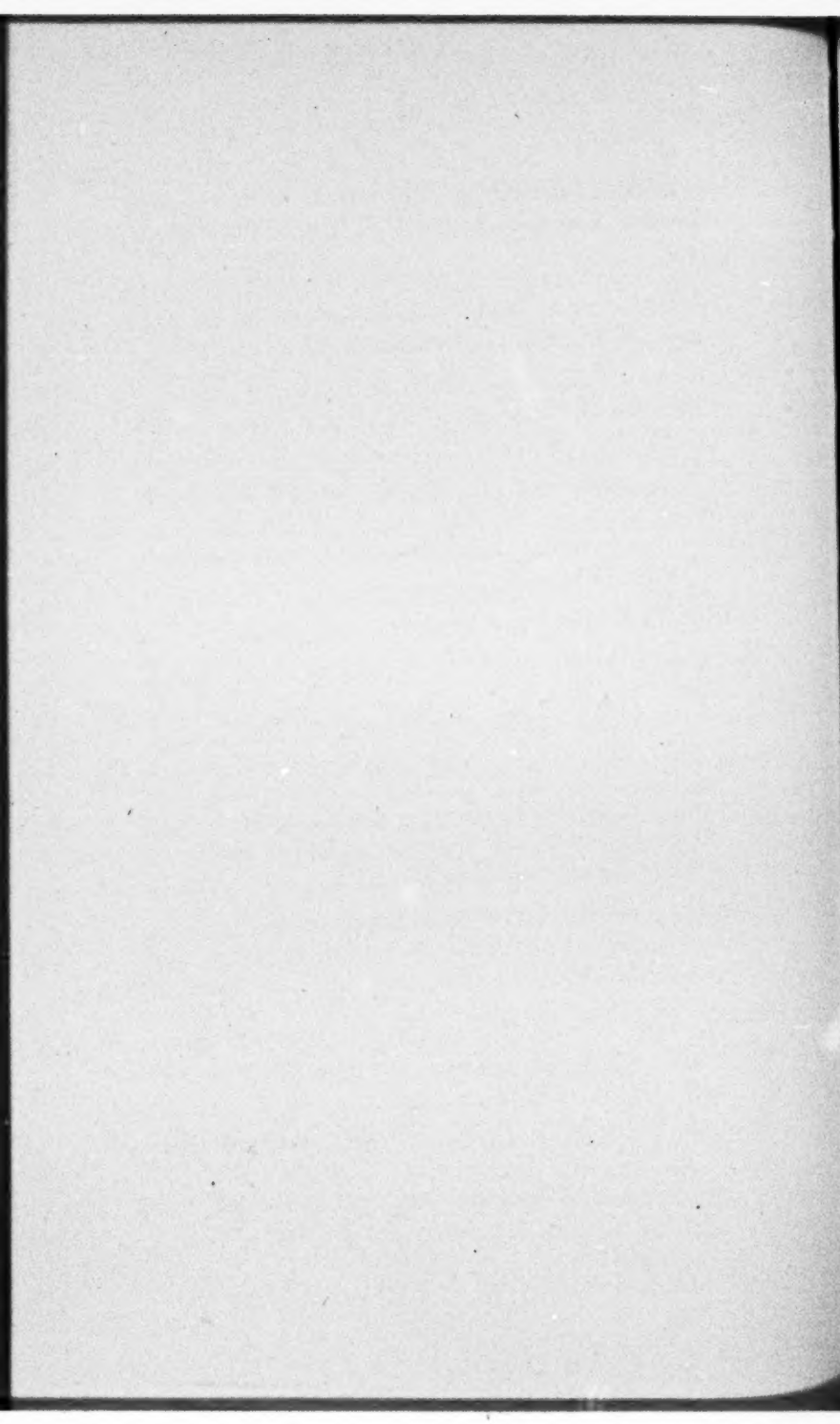
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SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

Petitioner, Samuel Okin, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, Second Circuit, affirming the judgment and order of the United States District Court for the Southern District of New York.

Opinions Below.

The Circuit Court of Appeals, Second Circuit, affirmed the judgment and order of the District Court on the opinion of the District Judge which is reported in 46 F. Supp. 481.

Statutes Involved.

The Public Utility Holding Company Act of 1935 (U. S. C., title 15, secs. 79 to 79z-6).

Specific reference is made in the petition to the following sections of the said Act:

"Section 12(c). It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding company systems, to safeguard the working capital of public utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rule, regulations, or orders thereunder.

Section 20(a). The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and trade terms used in this title. * * *.

Section 24(a). Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the Circuit Court of Appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals

for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *.

Section 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled 'An Act to establish a Court of Appeals for the District of Columbia', approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court."

Questions Presented.

I.

Is an action against an administrative body of the executive branch of the United States Government to enjoin it from acting beyond its statutory powers, an action against the United States and has the District Court of the United States jurisdiction of such an action?

II.

Does Section 25 of the Public Utility Holding Company Act of 1935 authorize the commencement of an equitable action against the Securities and Exchange Commission where it is acting beyond its statutory power and in violation of said Act, and have the District Courts of the United States jurisdiction of such actions and to review Rule U-42 adopted by the said Commission.

III.

Has the Securities and Exchange Commission the statutory power to adopt Rule U-42 under Section 12(c) of the Public Utility Holding Company Act of 1935 or any other provision of the said Act?

IV.

Does the Public Utility Holding Company Act of 1935 authorize the Securities and Exchange Commission to prevent a registered holding company (Electric Bond and Share Company) from purchasing its own preferred stock with its own cash by tenders or in the open market in accordance with the laws of the State of New York under which said corporation was organized and pursuant to the certificates of consolidation which organized said corpora-

tion, without first obtaining the permission and order of the said Securities and Exchange Commission to make said purchases of said preferred stock?

V.

Are the legal and property rights of the petitioner as a stockholder of the Electric Bond and Share Company being threatened and invaded by the acts of the Securities and Exchange Commission in preventing the said purchases of preferred stock by the said Electric Bond and Share Company?

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 347[a]).

Statement of the Case.

The petitioner, Samuel Okin, as owner and holder of record of nine thousand (9,000) shares of the common stock of the Electric Bond and Share Company, commenced an action on May 13th, 1942 for injunctive and other equitable relief against the Securities and Exchange Commission, to enjoin it from preventing the Electric Bond and Share Company from purchasing its own preferred stock with its own cash in accordance with the Certificate of Consolidation of the said Electric Bond and Share Company and as permitted by the laws of the State of New York, which said purchases are either by tender or in the open market; and to declare Rule U-42 promulgated by the said Commission, null and void and beyond the powers of the said Securities and Exchange Commission, as authorized by the provisions of the said Public Utility Holding Company Act

of 1935; and to enjoin the said Commission from enforcing the said Rule U-42 (R. 1).

A motion was made by the petitioner on May 19th, 1942, before District Judge Samuel Mandelbaum for preliminary injunctive relief (R. 10).

On the same date, the Securities and Exchange Commission moved to dismiss the action for lack of jurisdiction over the subject matter and person in that the said Commission contended that the said action was against the United States of America without its consent; and to dismiss on the ground of improper venue and to quash the return of service of summons (R. 10).

District Judge Mandelbaum denied the petitioner's motion and granted the Commission's motion (R. 11) and made the judgment and order denying the petitioner's motion and granting the Commission's motion and dismissing the action (R. 11), which was affirmed by the Circuit Court (R. 50).

The facts material to this application are as follows (R. 3-9):

The Securities and Exchange Commission is an independent agency in the executive branch of the Government of the United States.

The said Commission purporting to act pursuant to Section 12(c) of the Public Utility Holding Company Act of 1935 (U. S. C., title 15, secs. 79 to 79z-6) promulgated Rule U-42 which reads:

“ACQUISITION, RETIREMENT AND REDEMPTION OF SECURITIES BY THE ISSUER THEREOF.

- (a) General provisions.—No registered holding company or subsidiary thereof shall acquire, retire or redeem any security of which it is the issuer (or which it has assumed or guaranteed) except pursuant to a declaration notifying the Commission

of the proposed transaction, which has become effective in accordance with the procedure specified in Rule U-23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act."

(Exceptions are thereafter provided for which have no application to the facts herein.)

At all the times referred to in the complaint, the Electric Bond and Share Company was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, being the consolidation of the old Electric Bond and Share Company, whose certificate of incorporation was filed in the office of the Secretary of State of New York on February 28th, 1905, and Electric Bond and Share Securities Corporation whose certificate of incorporation was filed in the office of the Secretary of State of New York on January 16th, 1925, and the said certificate of consolidation pursuant to which the said Electric Bond and Share Company was organized was filed in the office of the Secretary of State of New York on March 13th, 1929.

Among the purposes enumerated in the said Certificate of Consolidation of the said Electric Bond and Share Company are the following:

"To purchase or otherwise acquire its own shares of stock (so far as may be permitted by law) and its bonds, debentures, notes, scrip or other securities or evidence of indebtedness and to hold, sell, transfer or reissue the same."

The said Certificate of Consolidation of the said Electric Bond and Share Company provides in paragraph numbered (g) as follows:

"The corporation from time to time may purchase any of its stock outstanding (so far as may be permitted by law) at such price as may be fixed by its Board of Directors or Executive Committee and accepted by the holders of the stock purchased, and may resell any stock so purchased at such price as may be fixed by its said Board of Directors or Executive Committee but in case the stock so purchased is subject to redemption, the price paid therefor shall not exceed the price at which it is redeemable."

On the 31st day of December, 1941, the said Electric Bond and Share Company had an earned surplus of \$63,116,391.94, and had issued and outstanding at least 283,000 of \$5 preferred stock and 1,101,955 shares of \$6 preferred stock as stated on the balance sheet of the said company as of December 31, 1941. At the time of the commencement of the aforesaid action, the said company had issued and outstanding approximately 280,000 shares of \$5 preferred stock and 1,100,000 shares of \$6 preferred stock.

Since on or about the 31st day of December, 1941, the said Electric Bond and Share Company had and has in its treasury cash and cash items which approximate \$24,000,000.

The said Electric Bond and Share Company was and still is a registered holding company under the provisions of the said Public Utility Holding Company of 1935, since on or about April 4th, 1938, but is not a public utility company as the term public utility company is defined in the said Public Utility Holding Company Act of 1935.

On or about the 30th day of December, 1941, the said Electric Bond and Share Company, pursuant to a resolution of the Board of Directors of the said company, duly adopted, filed a declaration with the Securities and Exchange Commission under Section 12(c) of the Public Utility Holding Company Act of 1935, and Rule U-42 adopted by the said Commission, in which said declaration the said Electric Bond and Share Company stated that it had

on hand the sum of approximately \$24,000,000 in cash and cash items which was not necessary for the business of said company, and the said company declared its intention to use \$5,000,000 of the said cash on hand in the purchase of its preferred stock on the New York Curb Exchange.

The Securities and Exchange Commission on the 20th day of February, 1942, made an order permitting the said declaration mentioned and described heretofore, to become effective only to the extent of \$2,000,000, and in said order the said Securities and Exchange Commission reserved jurisdiction with respect to the remaining \$3,000,000 pending the formulation by Electric Bond and Share Company of an exchange plan or plans for the distribution of assets of the said Electric Bond and Share Company to its preferred stockholders.

The said \$5 preferred stock of the said Electric Bond and Share Company sold as low as \$38 per share on the New York Curb Exchange during 1942; and the said \$6 preferred stock of the said company sold as low as \$40 per share on the New York Curb Exchange during 1942; and on May 12th, 1942, the said \$5 preferred stock sold for \$43 per share and the said \$6 preferred stock for \$48 per share on the said New York Curb Exchange.

The legal and property rights of the petitioner as the owner and holder of 9,000 shares of the common stock of Electric Bond and Share Company are being and have been invaded and threatened by the said acts of the said Securities and Exchange Commission and the persistent acts of the said Commission in enforcing the said Rule U-42 and its refusal to permit the said Electric Bond and Share Company to purchase its own stock with its own money as hereinbefore stated, is causing, has caused and will continue to cause irreparable damage to the petitioner without due process of law and in violation of the Constitution of the United States.

Specification of Errors To Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the District Court had no equitable and/or statutory jurisdiction to enjoin the Securities and Exchange Commission from exceeding its statutory authority under the Public Utility Holding Company Act of 1935.

2. In holding that the District Court had no jurisdiction to enjoin the Securities and Exchange Commission from enforcing Rule U-42 as being beyond the statutory authority of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935.

3. In holding that the District Court had no jurisdiction to enjoin the Securities and Exchange Commission from in any way, shape or manner interfering with the purchase by the Electric Bond and Share Company of its own preferred stock, with its own money, in accordance with the laws of the State of New York under which said company was organized and pursuant to its certificate of consolidation which organized said corporation.

4. In not holding that an action against an administrative body of the executive branch of the United States Government to enjoin it from acting beyond its statutory powers, is not an action against the United States and that the District Court has jurisdiction of such an action.

5. In not holding that the District Court had jurisdiction of the petitioner's action against the Securities and Exchange Commission either as a matter of equity or by virtue of the provisions of Section 25 of the Public Utility Holding Company Act of 1935.

6. In not holding that the Securities and Exchange Commission exceeded its statutory authority when it promulgated and adopted Rule U-42, and that the District Court had jurisdiction to review the said Rule.

7. In not holding that the Securities and Exchange Commission has no statutory authority under the provisions of the Public Utility Holding Company Act of 1935 to in any way, shape or manner interfere with the purchase by the Electric Bond and Share Company of its own preferred stock with its own money in accordance with the laws of the State of New York under which said corporation was organized and pursuant to its charter.

8. In not holding that the petitioner is entitled to equitable relief against the Securities and Exchange Commission.

Reasons for Granting the Writ.

While the brief hereto annexed presents in more amplified form, the reasons relied on by petitioner for the allowance of the writ, these reasons may be summarized as follows:

The determination of the Circuit Court of Appeals is contrary to the decisions of this Court.

The issues involved present questions of vital public and national importance. This Court recently granted permission to the Securities and Exchange Commission to have reviewed the order of the Court of Appeals of the District of Columbia in the matter of Securities and Exchange Commission v. Chenery Corporation, which involved the issue of the jurisdiction of the Commission under the Public Utility Holding Company Act of 1935. It is respectfully submitted that this petition involves far more important issues than the said Chenery case, as this peti-

tion seeks the review of a judgment wherein is involved the jurisdiction of our Courts to enjoin the Commission from exceeding its powers under the said Public Utility Holding Corporation Act of 1935 and it is submitted that the issues involved herein not only affect millions of investors in the United States but affects the jurisdiction of the Courts over an administrative body of the United States Government, and warrants the examination and review by this Court of the judgment of the Circuit Court of Appeals, Second Circuit, affirming the judgment and order of the District Court for the Southern District of New York.

Dated, New York, December 3rd, 1942.

SAMUEL OKIN,
Attorney for Petitioner.





BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The only Court which rendered any opinion is the District Court which is reported in 46 F. Supp. 481, which opinion was adopted by the Circuit Court, and is found at pages 41-45 of the record.

Jurisdiction.

The jurisdiction is developed at page 5 of the petition.

**Statement of the Case, Questions Presented,
Statutes Involved, Etc.**

The statement of the case, the questions presented, and specifications of errors to be urged have been set forth in the petition.

ARGUMENT.

1(a) The petitioner's action for injunctive relief was not against the United States and the District Court had jurisdiction.

A court of equity has power to enjoin the acts of an administrative body of the executive branch of our Government which is proceeding beyond its statutory authority.

In *Waite v. Macy*, 246 U. S. 606, this Court in affirming the decree of the Circuit Court of Appeals reversing the District Court and granting an injunction, said at page 608:

"No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but is equally true that the board cannot enlarge the powers given to it by statute and cover usurpation by calling it a decision on purity, quality or fitness for consumption. *Morrill v. Jones*, 106 U. S. 466. *United States v. United Verde Copper Co.*, 196 U. S. 207, 215. *United States v. George*, 228 U. S. 14, 21. Again, it is true that Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. *First National Bank of Albuquerque v. Albright*, 208 U. S. 548. But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make."

And further at page 610:

"The Secretary and the Board must keep within the statute (*Merritt v. Welsh*, 104 U. S. 694) which goes to their jurisdiction (see *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 544), and we see no reason why the restriction should not be enforced by injunction, as it was, for instance, in *Bacon v. Rutland R. R. Co.*, 232 U. S. 134; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620; *Sante Fe Pacific R. R. Co. v. Lane*, 244 U. S. 492. We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights." (Italics ours.)

This Court in *Merritt v. Welsh*, 104 U. S. 694, said at page 704:

"If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department, or the Courts, to take the part

of legislative guardians, and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make."

It is submitted that when this Court affirmed the decree of the Circuit Court in *Electric Bond and Share Company v. Securities and Exchange Commission*, 303 U. S. 419, 443, and therein sustained the dismissal of the cross-bill of the said company wherein it sought among other things injunctive relief against the Commission, that such dismissal was not because the Court lacked jurisdiction but because this Court declined the invitation "to enter into a speculative inquiry for the purpose of condemning statutory provisions, the effect of which in concrete situations, not yet developed, cannot be definitely perceived."

In *Interstate Commerce Commission v. United States ex rel Humbolt Steamship Company*, 224 U. S. 474, this Court, when affirming, said at page 484:

"The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and, in the main, explicitly directed, by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed The answer of the Commission is by 'a reversal by the tribunal of appeal.' And such a tribunal, it is intimated, is the United States commerce court.

But the proposition is plainly without merit, even although it be conceded, for the sake of argument, that the commerce court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an application was not entitled to relief. This is so because, the action of the Commission refusing to entertain a petition on the ground that its subject matter was not within the scope of the powers conferred upon it would not be embraced within the hypothetical concessions thus made. A like view disposes of the cases relied upon in which it was decided that certain departmental orders were not susceptible of being reviewed by mandamus. We do not propose to review the cases, as we consider them to be plainly inapposite to the subject in hand."

This Court in the case of *In re National Labor Relations Board*, 304 U. S. 486, determined that the Judges of a Circuit Court of Appeals should be prohibited from making an order which this Court held they lacked jurisdiction to make under the National Labor Relations Act. The situations are apposite and it is inconceivable that the Courts lack jurisdiction to enjoin the Securities and Exchange Commission, a mere administrative body, from exceeding its statutory authority under the Public Utility Holding Company Act of 1935.

District Judge Mandelbaum in his opinion stated (R. 44):

"Plaintiff, in support of jurisdiction, contends that the claim of sovereign immunity will not defeat an equitable action, where the acts of governmental officers unlawfully invaded vested rights. Some of the

cases cited by him have dealt with such question. *Fox v. Ickes*, 300 U. S. 82; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Franklyn Turnpike v. Tugwell*, 85 F. (2d) 208.

I fail to discern any similarity to the cases cited by the plaintiff and the one at bar. In the first place, they were suits against individuals and not against an agency of the government itself. Secondly, Section 24 (a) provided a remedy to those who question the action of the Commission. This meets the constitutional requirements of due process of law. To sustain the plaintiff's argument would in effect result in a contravention of the intent of Congress in enacting Section 24 (a) of the Holding Company Act of 1935. Evidently, plaintiff is seeking a review of an order of the defendant through the medium of an injunction. This he cannot do. *Myers v. Bethlehem Corp.*, 303 U. S. 41."

It is respectfully submitted that the decisions hereinbefore referred to are contrary to and do not support the District Court's opinion, adopted by the Circuit Court.

The Securities and Exchange Commission in its said order dated February 20th, 1942, permitted the declaration of the Electric Bond and Share Company to become effective to the extent of \$2,000,000, and reserved jurisdiction as to the remaining \$3,000,000. The said order was therefore merely interlocutory and not reviewable under Section 24(a) of the said Public Utility Holding Company Act of 1935.

The petitioner's right to relief in the lower Courts was predicated on the equitable jurisdiction of the District Court and/or the jurisdiction provided for in Section 25 of the Public Utility Holding Company Act of 1935, hereinafter referred to.

It is submitted that the District Court had jurisdiction of the action.

1(b) Section 25 of the Public Utility Holding Company Act of 1935, authorizes the commencement of an equitable action against the Securities and Exchange Commission. The District Court had jurisdiction to review Rule U-42.

Under Section 25 of the Public Utility Holding Company Act of 1935, District Courts of the United States are given jurisdiction of equitable actions with respect to the provisions of said Act.

Section 20 of said Act authorizes the Securities and Exchange Commission to make, issue, amend and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of the Act.

The promulgation of Rule U-42 by the said Commission was in excess of its statutory authority and the said Commission violated the provisions of the said Act. The District Court had jurisdiction under Section 25 of said Act, to enjoin any violation of the provisions of the Act.

The reference in Section 25 to violations of the Act, must necessarily mean all violations by every one affected by the Act, including the Securities and Exchange Commission. That said Section 25 contemplated the commencement of actions against the said Commission is evident from the provision therein, "No costs shall be assessed for or *against* the Commission in any proceeding under this title brought by or *against* the Commission in any court." (Emphasis ours.)

In referring to said Section 25, District Judge Mandelbaum said:

"Plaintiff urges that Section 25 of the Holding Company Act of 1935 confers upon this court jurisdiction to entertain this suit. An examination of the language persuades me otherwise. This section deals with the jurisdiction of the district court over offenses committed by persons or suits against such persons

for violations of the Holding Company Act of 1935. Nothing in the language indicates that it includes the Securities and Exchange Commission as a possible violator of the Act, nor has any case been cited which in any way supports such theory."

It is respectfully submitted that the lower Court erred in its interpretation of said Section 25.

This Court's recent decision in *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407, it is submitted, completely sustains our contentions that the District Court had jurisdiction of the petitioner's action under said Section 25. In said *Columbia Broadcasting* case, this Court said at page 423:

"Moreover, if the Commission's order is as we hold a reviewable order, appellant is free to seek review under § 402 (a). It is not thereby, as the court below seemed to think, improperly substituting a different procedure and court for that which Congress has prescribed for the trial of like issues so far as they may be raised on review of an order denying a license. Such issues may likewise be involved in a proceeding, upon the Commission's own motion, for modification or cancellation of a license, which concededly is reviewable under § 402 (a). See *Scripps-Howard Radio, Inc., v. Federal Communications Commission*, *supra*. But review of the order by a licensee in such a proceeding affords no adequate remedy. If ever instituted, which is uncertain, it would come too late to save appellant from the injury wrought by the outlawry of its contracts."

And further at page 425:

"The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the

review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

We conclude that the Commission's promulgation of the regulations is an order reviewable under § 402 (a) of the Act, and that the bill of complaint states a cause of action in equity."

Section 402(a) of the Communications Act of 1934 is not only similar to said Section 25 of the Public Utility Holding Company Act of 1935, but it is our contention that the said Section 25 is broader in its scope than said Section 402(a).

The Communications Act of 1934 (§ 402[a]), provides that:

*"The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for modification of an existing radio station license), and such suits are hereby authorized to be brought as provided in that Act. * * *"*

Subdivision (b) of Section 402 of said Communications Act of 1934 is similar to Section 24(a) of the Public Utility Holding Company Act of 1935.

The facts in the said Columbia Broadcasting case (*supra*) and this Court's determination therein, are so applicable to facts herein, that the conclusion is inevitable

that the District Court had jurisdiction of the petitioner's action, and the judgment of the Circuit Court herein is contrary to this Court's said decision.

1(c) The Securities and Exchange Commission had no power to adopt Rule U-42 and has no authority in any way, shape or manner to prevent the Electric Bond and Share Company from purchasing its preferred stock with its own cash by tenders or in the open market in accordance with the laws of the State of New York under which said corporation was organized and pursuant to the certificate of consolidation which organized said Electric Bond and Share Company, without first obtaining the permission and order of the said Securities and Exchange Commission to make said purchases of said preferred stock.

The Public Utility Holding Company Act of 1935 does not contain a single provision which can in any way be construed as preventing a holding company from purchasing its own preferred stock with its own cash in accordance with the laws under which it was organized and pursuant to its own certificate of incorporation.

The only section of the said Act which the Securities and Exchange Commission apparently believes authorizes it to interfere with said purchases and to promulgate Rule U-42 is Section 12(c). A brief consideration of said statutory provisions destroys completely the Commission's contentions.

Section 12(c) is referred to in 49 Stat. 823 as "dividend payments".

The Senate Report No. 621 of the Senate of the United States accompanying the said Public Utility Holding Company Act of 1935, at page 34, in referring to Section 12 of said Act, says:

"Complete regulation of intercompany transactions is provided to prevent the milking of operating com-

panies in the interests of the controlling holding-company groups. Section 13 below deals specifically with service, sales, and construction contracts within holding-company systems. Section 12 covers other intercompany transactions detrimental to operating companies. The range of practices which this section attempts to reach is broad because unless appropriate discretion is given to the Commission, new devices will spring up and may result in nullifying the provisions of title I."

And the said Senate Report No. 621 further states, at page 35, in referring to Section 12(c):

"Subsection (c) makes it unlawful for any company in a holding company system to declare or pay any dividend or to acquire or redeem any of its own securities in contravention of such rules, regulations or order as the Commission may prescribe to protect the financial integrity of such companies, to safeguard their working capital or to prevent the payment of dividends out of capital or unearned surplus. The exaction of excessive dividends from subsidiary operating companies may be even more harmful than the taking of upstream loans."

This Court in *Electric Bond and Share Company v. Securities and Exchange Commission*, 303 U. S. 419, when discussing the various sections of the said Public Utility Holding Company Act of 1935, at page 438, referred to Section 12 as relating to "intercompany transactions".

A purchase by a holding company of its preferred stock with its own cash by tenders or in the open market in accordance with the laws of the State under which it is organized and pursuant to its certificate of incorporation,

does not constitute an "intercompany transaction" or a "dividend payment".

The purchase by the Electric Bond and Share Company of its preferred stock of its own cash by tenders or in the open market in accordance with the laws of the State of New York under which said corporation was organized and pursuant to the certificate of consolidation under which the said company was organized (hereinbefore referred to), is not and does not constitute any "intercompany transaction" or "dividend payment" as provided for in Section 12(c) of the said Public Utility Holding Company Act of 1935.

The Securities and Exchange Commission had no statutory power to adopt the said Rule U-42 and the said Rule is not authorized by the provisions of the said Public Utility Holding Company Act of 1935. The promulgation and adoption of the said rule was in violation of the provisions of the said Act.

The Securities and Exchange Commission had and has no power whatsoever under the provisions of the said Public Utility Holding Company Act of 1935, or any other Act of Congress, to in any way prevent the said Electric Bond and Share Company from in any way purchasing its outstanding preferred stock with its own cash as permitted by the laws of the State of New York and the Certificate of Consolidation of the said Electric Bond and Share Company pursuant to which said corporation was organized.

In *Jones v. Securities and Exchange Commission*, 298 U. S. 1, at page 23, this Court said:

"The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rests—that this shall be a government of laws—, because to the precise extent that the mere

will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant and if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635, should never be forgotten: 'It may be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principia*'."

The foregoing, it is respectfully submitted, supports plaintiff's contentions that Rule U-42 is not authorized by the provisions of the Public Utility Holding Company Act of 1935 and constitutes an attempted usurpation of power by the Securities and Exchange Commission.

1(d) The laws of the State of New York permit a corporation to purchase its own preferred stock with its own cash from its earned surplus either by tenders or in the open market or in any manner whatsoever which is lawful.

On the 31st day of December, 1941, the said Electric Bond and Share Company had an earned surplus of \$63,116,391.94, as appears on the balance sheet of the said company as of December 31, 1941 (R. 8); and in its decla-

ration filed with the Securities and Exchange Commission on December 30, 1941 the said Electric Bond and Share Company stated it had on hand \$24,000,000 in cash and cash items which was not necessary for the business of the said company, and in said declaration, the said Electric Bond and Share Company stated its intention to use \$5,000,000 of its said cash in the purchase of its preferred stock on the New York Curb Exchange (R. 9).

The laws of the State of New York permit such purchases under such circumstances.

City Bank of Columbus v. Bruce, 17 N. Y. 507.

Vail v. Hamilton, 85 N. Y. 453, 457.

Cross v. Beguelin, 252 N. Y. 262, 265 (affirming 226 App. Div. 349, 350).

In re Fechheimer Fishel Co., 212 Fed. (2nd Cir.) 357, 361.

Joseph v. Raff, 82 App. Div. 47, 54; aff. 176 N. Y. 611.

Grasselli Chemical Co. v. Aetna Explosive Co., 258 Fed. 66.

Melniker v. American Title & Guarantee Co., 253 App. Div. 570.

1(e) The legal and property rights of the petitioner are being threatened and invaded by the acts of the Securities and Exchange Commission.

The petitioner as owner of the nine thousand (9,000) shares of the common stock of the said Electric Bond and Share Company has legal and property rights by reason of the said stock interests which are being threatened and invaded by the acts of the said Securities and Exchange Commission.

Ashwander v. Valley Authority, 297 U. S. 288, 318, 321, 322, 323.

Matter of American Fibre Chair Seat Corp., 265 N. Y. 416, 420.

Lord v. Equitable Assur. Society, 194 N. Y. 212, 228.

Personal Industrial Bankers v. Citizens Budget Co., 80 F. (2d) 327, 328 (C. C. A. 6th Cir., certiorari denied 298 U. S. 674).

Wagstaff v. Holly Sugar Corp., 253 App. Div. 616, 620 (aff. 279 N. Y. 625).

CONCLUSION.

It is respectfully submitted that this petition should be granted.

SAMUEL OKIN,
Attorney for Petitioner.



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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 576

SAMUEL OKIN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

**BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION**

OPINIONS BELOW

The opinion of the district court (R. 41-45) is reported in 46 F. Supp. 481.

The per curiam decision of the Circuit Court of Appeals for the Second Circuit, affirming the order of the District Court on the basis of the opinion below (R. 50), is reported in 130 F. (2d) 903.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on October 27, 1942 (R. 50-51). The pe-

tition for a writ of certiorari was filed on December 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the district court had jurisdiction over a suit by petitioner, a stockholder of a registered holding company, against the Commission, to enjoin the Commission from enforcing its rule and from preventing the company from purchasing its own stock, and to obtain a declaration that the rule is invalid.

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 (hereinafter referred to as the "Act") are set out in the Appendix.

STATEMENT

The facts in this case, which are not in dispute, may be summarized as follows:

Petitioner, who owns 9,000 shares of common stock of Electric Bond and Share Company (a registered holding company), filed a complaint (R. 3-11) in the District Court for the Southern District of New York, seeking to enjoin the Commission from preventing the company from purchasing its own preferred stock, to enjoin the enforcement of Rule U-42 (see Appendix, *infra*, p. 11) as applied to Electric Bond and Share

Company, and to obtain a declaration that Rule U-42 is null and void and beyond the powers of the Commission under the Act.

Rule U-42 was adopted by the Commission pursuant to Section 12 (c) of the Act. The rule provides, in pertinent part, that no registered holding company shall acquire, retire, or redeem any of its own securities except pursuant to a declaration filed with the Commission in accordance with the procedural provisions of Rule U-23 (*infra*, pp. 11-13) and an order of the Commission. Electric Bond and Share Company filed a declaration with the Commission stating its intention to use \$5,000,000 of cash on hand to purchase its outstanding preferred stock. The Commission thereafter issued an order pursuant to Section 12 (c) and Rule U-42 permitting the declaration to become effective in respect of \$2,000,000, reserving jurisdiction in respect of the remaining \$3,000,000 and suggesting that the company formulate an exchange plan or plans for the distribution of its assets to its preferred stockholders (R. 10).

In the district court the Commission moved to dismiss petitioner's action for lack of jurisdiction (R. 24-25). The district judge entered an order (R. 45) denying petitioner's motion for a temporary injunction and granting the Commission's motion to dismiss (R. 41-45). The circuit court of appeals affirmed, without opinion (R. 50).

ARGUMENT

The decision of the court below is correct and presents no conflict. Petitioner has mistaken his remedy; his suit against the Commission in the district court was foreclosed by established and fundamental principles of jurisdiction to review administrative action.

1. Section 24 (a) of the Act provides the method for judicial review of the Commission's orders. It prescribes the familiar procedure of a petition by any person or party aggrieved to the appropriate circuit court of appeals. Congress thus has specified an exclusive method for review of the Commission's orders, and petitioner was accordingly foreclosed from obtaining review by a different path.¹ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375.

2. In any event, the actions of the Commission attacked by petitioner have no such impact as entitles him to judicial review. Neither Rule U-42 nor the Commission's order is reviewable at this stage. Rule U-42 neither requires nor finally for-

¹ Plainly the provisions of Section 25 of the Act relating to suits to enjoin violations of the Act and referring to costs "against" the Commission do not, as petitioner contends (Pet. 18-19), authorize an alternative method of review by injunction in the district courts. The reference to suits to enjoin violations relates to suits by the Commission; the reference to costs relates to suits brought against the Commission in the circuit courts of appeals under Section 24 (a).

bids any action. It merely imposes as a condition precedent to the taking of certain action that Commission approval be obtained. Only if the Commission issued an order pursuant to this rule denying effectiveness to a declaration could there be any prejudicial effect upon those subject to it. No such order has here been entered. Therefore, in contrast to the situation presented in *Columbia Broadcasting System, Inc., v. United States*, 316 U. S. 407, 420, there is here further administrative action to be taken before the rule has legal impact and the rule does not "determine in advance the rights of others affected by it."

It follows that the gravamen of petitioner's complaint is not the existence or enforcement of the procedural Rule U-42. Rather it is the alleged injury to him as a common stockholder resulting from the Commission's order issued pursuant to Section 12 (c) of the Act and Rule U-42, insofar as it reserved jurisdiction with respect to the use of the remaining \$3,000,000 in the purchase of preferred stock of Electric Bond and Share Company. But this order, in turn, is not final. To the extent that it reserved jurisdiction as to the use of the \$3,000,000, the order was interlocutory in character and hence nonreviewable under Section 24 (a). Congress has provided for review only of final orders in the circuit courts of appeals and any alleged injuries incident to the issuance of interlocutory orders are deemed remediable only on such review. *Federal Power Commission*

v. *Metropolitan Edison Co.*, 304 U. S. 375; *Bradley Lumber Co. v. National Labor Relations Board*, 84 F. (2d) 97 (C. C. A. 5), certiorari denied, 299 U. S. 559. Petitioner's claim of alleged injury creates no jurisdiction outside the statutory scheme and does not justify interference by a district court with the orderly procedure prescribed by Congress, thus forestalling the entry of a final order by the Commission. Cf. *Federal Power Commission v. Metropolitan Edison Co.*, *supra*, at p. 385; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52; *United States v. Griffin*, 303 U. S. 226, 237; *United States v. Los Angeles & Salt Lake R. R.*, 273 U. S. 299, 314.

3. Petitioner was additionally precluded since his suit was against the Commission itself. The United States and its agencies may be sued only with the consent of Congress. *Nassau Smelting & Refining Works, Ltd., v. United States*, 266 U. S. 101, 106; *Schillinger v. United States*, 155 U. S. 163, 166; *Securities and Exchange Commission v. Andrews*, 88 F. (2d) 441 (C. C. A. 2). Here, Section 24 (a) of the Act, providing for review of orders by the circuit courts of appeals, embodies the only consent given by Congress to a suit against the Commission.²

² Congress has expressly consented to actions in district courts to enforce, enjoin, set aside, annul, or suspend orders of the Interstate Commerce Commission and the Federal Communications Commission. Urgent Deficiencies Act, 28 U. S. C. 48; Communications Act of 1934, 47 U. S. C. 402 (a).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1943.

Petitioner's reliance, therefore, on such cases as *Interstate Commerce Commission v. United States ex rel. Humbolt Steamship Company*, 224 U. S. 474 (Pet. 15-16) and *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407 (Pet. 19-20) is misplaced. Other cases cited by petitioner involved suits against individuals, not against the United States or an agency. See *Hammond-Knowlton v. United States*, 121 F. (2d) 192, 194 (C. C. A. 2). In *Electric Bond and Share Company et al. v. Securities and Exchange Commission*, 303 U. S. 419, relied upon by petitioner (Pet. 15), the district court granted the Commission's motion to dismiss, for lack of jurisdiction, the company's cross-bill to enjoin the Commission itself from enforcing the Public Utility Holding Company Act. The basis of the motion was the contention that the Commission could not be sued because Congress had not consented to such an action against the Commission. This aspect of the district court's action was not appealed by the company and hence was not before this Court for review. This Court considered the cross-bill only as it applied to individual defendants.

APPENDIX

The sections of the Public Utility Holding Company Act of 1935 (c. 687, 49 Stat. 803, 15 U. S. C. 79a *et seq.*) which are pertinent in the consideration of this case provide as follows:

SEC. 12. * * *

(c) It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public-utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

* * * * *

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the

District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall

be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

SEC. 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Ju-

dicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

* * * * *

Rule U-42, promulgated pursuant to Section 12 (c) by the Commission, provides in pertinent part, as follows:

Rule U-42. Acquisition, Retirement, and Redemption of Securities by the Issuer Thereof.

(a) *General provisions.*—No registered holding company or subsidiary thereof shall acquire, retire or redeem any security of which it is the issuer (or which it has assumed or guaranteed) except pursuant to a declaration notifying the Commission of the proposed transaction, which has become effective in accordance with the procedure specified in rule U-23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act.

Rule U-23, referred to in Rule U-42, reads as follows:

Rule U-23. Procedure Applicable to Certain Applications and Declarations.

(a) *Scope of rule.*—The provisions of this rule apply to applications under sections 6 (b), 9 (c) (3) and 10 of the Act or rule U-50 and declarations pursuant to sections 7, 12 (b), 12 (c), 12 (d) and 12 (f) of the Act and any rule of the Commission

thereunder, to declarations under rule U-65, and to declarations regarding proposed accounting entries subject to instruction 8C of the Uniform System of Accounts for Public Utility Holding Companies.

(b) *Designation of filings as applications or declarations.*—Any filing as to any matter specified in paragraph (a) shall be designated an application, if filed pursuant to section 6 (b), 9 (c) (3) or 10 of the Act or rule U-50, and shall be designated a declaration with respect to any other matter specified in paragraph (a).

(c) *Effective date.*—A declaration or application will become effective or be granted respectively by order issuing as of course at 4:30 p. m., E. S. T. (or 1:00 p. m., if a Saturday) on the thirtieth day after the filing thereof or the fifteenth day after the filing of the last amendment thereto, whichever is later, or if such day be a Sunday or a legal holiday, on the next business day, unless prior thereto the Commission shall have ordered a hearing thereon. The Commission may at the request of the applicant or declarant advance, and the applicant or declarant may by written or telegraphic notice to the Commission postpone, such date.

(d) *Effect of order for hearing.*—If the Commission deems that a hearing is appropriate in the public interest or the interest of investors or consumers, it will issue an order for hearing thereon, and in that event a declaration or application shall not become effective or be granted except pursuant to further order of the Commission.

(e) *Notice of filing.*—The Commission will publish in the Federal Register notice of the filing of a declaration or application,

stating the earliest date upon which such declaration or application, as filed or as amended, may be permitted to become effective or be granted. Any interested person may, not later than fifteen days after the publication of such notice or such other date as may be fixed therein, request the Commission in writing that a hearing be held, stating his reasons therefor and the nature of his interest.